

likely will develop fundamentally different approaches to OVS. Without specific minimum standards, the approval process likely will be just as contentious as VDT. Indeed, the lack of final rules for video dialtone as well as regulatory delays were reported as among the underlying reasons many LECs withdrew their video dialtone applications.³¹

Thus, given the abbreviated time available for evaluation of certification filings, the number and complexity of the issues involved, and the fact that operators are unlikely to establish uniform OVS offerings, approval of a certification in the absence of specific minimum regulatory standards will amount to a "rubber stamp" approval or an act of faith.

³¹ See, "SNET Says Video Dialtone Encumbrances Mark Shift," Interactive Video News (February 5, 1996) (encumbrances associated with VDT and approval delays cited as reason SNET withdrew VDT application); Berniker, Mark, "US West Gets Cold Feet Over VDT; Telco Withdraws FCC Applications; Awaits Feedback From Omaha Trial," Broadcasting & Cable, (June 5, 1995) (economics, technology and regulation explain reason for withdrawal of VDT applications); "Bell Atlantic's VDT Withdrawal Revives Blame Game," Washington Telecom News, (May 1, 1995) (USTA president quoted as stating that industry is frustrated because some VDT approvals have taken too long).

**3. In The Absence Of Minimum Specific Standards
Adopted In This Proceeding, The Commission May Be
Hesitant To Reach Decisions That Adversely Impact
Prior Investments**

Finally, in the absence of specific minimum standards, the Commission will be hesitant to reach materially adverse decisions on many issues, particularly cross-subsidization, which impact on the economic viability of the service. Courts have recognized that it is only human for regulators to be cognizant of the real-world impact of regulatory decisions upon prior investments, especially where such investments occurred under the color of regulatory authority.³² "Approving" OVS certifications and then imposing standards in case-by-case adjudications risks the Commission being "held hostage" by prior investment made by OVS operators.

**V. THE 1996 ACT REQUIRES THAT CERTAIN PROVISIONS OF TITLE VI
APPLY TO OVS OPERATORS UNDER THE SAME TERMS AND CONDITIONS
AS THEY APPLY TO CABLE OPERATORS**

In Section 653 of the Act, Congress enumerated certain provisions of Title VI that would apply to OVS operators. Congress made clear that these provisions should impose "obligations that are no greater or lesser than the obligations" imposed on cable operators.³³ Thus, the Commission is obligated to ensure that all the provisions of Title VI that the Act

³² See, generally, Community Broadcasting Co. v. FCC, 274 F.2d 753 (1960). ("Ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their effort or intent." Id. at 759.)

³³ 47 U.S.C. § 573(c)(2)(A) (emphasis added).

mandates for OVS are applied on the same terms as they are applied to cable operators.

For example, the Act explicitly requires that OVS operators provide public, educational, or governmental ("PEG") channels and support for such channels pursuant to Section 611 on the same basis as cable operators. The suggestion that OVS operators be allowed to demand a cable operator's PEG channels is not only inequitable, it is inconsistent with the language of Section 653 of the 1996 Act. Congress did not tell the Commission to look for ways to reduce the obligations imposed under Section 611 for OVS operators. It told the Commission to apply Section 611 to OVS operators in the same manner it applies to cable operators, no more and no less.

Similarly, the concern expressed in the NPRM that OVS operators might have difficulty complying with certain Title VI requirements if the system crosses franchise boundaries, television markets, or other geographic zones is irrelevant. Many cable systems serve multiple franchise areas and television markets. Yet, cable operators are able to comply with PEG, must carry, sports exclusivity, network non-duplication, and syndicated exclusivity requirements. OVS operators must be required to do so as well. The statute does not permit imposing on OVS operators merely a watered down version of these obligations.

The Commission also should adopt a rule prohibiting LECs from engaging in "economic redlining." The Communications Act contains an anti-redlining provision for cable operators, and

many local franchising authorities impose similar prohibitions. Narrowly targeted entry into the video business by telcos will limit the benefits of competition to targeted areas -- typically affluent neighborhoods and businesses -- which likely already have the best access to competitive alternatives. Thus, low income areas -- which arguably could benefit the most from greater competition -- effectively will be denied these benefits.

Finally, as noted above, telcos have an incentive to enter the video business as a means of limiting cable operators' ability to compete in the local telephone business. Allowing telcos to narrowly target their entry into the video business only heightens their ability to target specific cable operators announcing an intention to enter the telephone business.³⁴

VI. CABLE OPERATORS OR OTHER NON-LECS SHOULD BE ALLOWED TO ESTABLISH AND MAINTAIN OVS SYSTEMS

The Commission should allow cable operators and other non-LECs to establish and maintain an OVS pursuant to its authority under Section 653(a)(1) of the 1996 Act: "an operator of a cable system or any other person may provide video

³⁴ The concern that LECs will engage in "economic redlining" is not theoretical. For example, on May 23, 1994, the Consumer Federation of America, the National Association for the Advancement of Colored People, the National Council of La Raza, and others, filed petitions with the FCC alleging that the video dialtone plans of four regional Bell Operating Companies demonstrate "a clear and systematic pattern of not serving some lower income areas, which turn out to be much more heavily minority areas." See "Petition for Relief from Unjust and Unreasonable Discrimination in the Deployment of Video Dialtone Facilities," filed May 23, 1994 ("Petition"). Among the issues identified in the Petition is a tendency among the BOCs in question to focus video entry in areas with relatively higher income levels and lower minority concentrations. See, e.g., Petition at 7.

programming through an open video system" to the extent permitted by the Commission. Allowing cable operators and other non-LECs to establish OVS systems would enhance the development of this new type of MVPD and provide further outlets for unaffiliated video programmers.³⁵

As described above, Congress created OVS as a new, functionally different type of MVPD with rights and responsibilities differing from those MVPDs regulated under other models. If, as Congress intended, OVS offers a viable method of providing video service and serves the needs of operators, programmers and end users, then there is no reason artificially to limit which companies may opt to create an OVS.

Moreover, cable operators and other non-LECs also should be allowed to offer video programming on an OVS established by another party. The language of Section 653(a)(1) quoted above clearly permits this. Further evidence of this Congressional intent is found in subsection 653(b)(1)(A), which requires the Commission to adopt regulations prohibiting discrimination "among video programming providers with respect to carriage on its open video system." The statutory prohibition against discrimination is not qualified (except for PEG and must carry),³⁶ and therefore does not admit of an interpretation which would preclude access by cable operators and other non-LECs.

³⁵ See Notice at ¶ 64.

³⁶ Thus, even "reasonable" discrimination (if such a thing exists) with regard to access to OVS capacity is absolutely prohibited.

VII. THE COMMISSION SHOULD CLARIFY THE EXTENT TO WHICH VDT SYSTEMS ARE "GRANDFATHERED"; LECS WITH "GRANDFATHERED" VDT SYSTEMS SHOULD BE REQUIRED TO CONVERT TO ONE OF THE FOUR STATUTORY MODELS

As noted by the Commission,³⁷ the 1996 Act terminated the Commission's VDT "regulations and policies," but did not require the termination of VDT systems "approved" prior to the date of enactment. The Conference Report states that "repeal of the Commission's video dialtone regulations is not intended to alter the status of any video dialtone service offered before the regulations required by this section become effective."³⁸

Thus, the statutory language suggests that any "approved" system is grandfathered, while the explanatory statement indicates that VDT service "offered" prior to enactment is grandfathered. Under the Title II-based VDT rules, carriers could construct VDT systems upon receipt of section 214 approval; offering service to customers could not occur until the LEC had an effective tariff for VDT on file at the Commission. Only one commercial VDT service ever prosecuted a tariff until it was effective.³⁹ Thus, it appears possible that a LEC could argue that its VDT "service" is grandfathered by virtue of the section 214 grant, regardless of whether final tariff approval was received and service was initiated.

³⁷ Notice at ¶ 75.

³⁸ Conference Report at 179 (emphasis added).

³⁹ Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 10 Rates Terms and Regulations, 10 F.C.C.R. 10831 (CCB 1995). Even this tariff was subject to an investigation.

The Commission's discussion of the repeal of the VDT rules offers no guidance on these issues, which are not trivial. In compliance with the 1996 Act, the Commission took action to terminate its VDT docket, to repeal its VDT rules and to revoke certain orders implementing VDT requirements.⁴⁰ If the Commission will no longer apply the VDT rules, and carriers with VDT authorizations but without effective tariffs are allowed to offer service as grandfathered systems, such systems would be effectively unregulated. As demonstrated below, Congress intended that LEC video services would be regulated under one of four regulatory models. To avoid any confusion over this matter, the Commission should clarify that only VDT systems with effective tariffs as of the date of enactment are grandfathered, and that the prospective elimination of the VDT rules does not relieve grandfathered systems of their obligation to comply with conditions specified in applicable section 214 approvals, tariffs, and other VDT rules in effect prior to enactment of the 1996 Act.⁴¹

The 1996 Act provision grandfathering VDT services should be viewed as temporary. Section 651(a)(1-4) establishes four regulatory models under which telephone companies may offer video services. Section 651(a)(3) provides that a common carrier which provides video programming to its subscribers in any manner

⁴⁰ See, Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, FCC 96-99, Report and Order (Proceeding Terminated), ¶¶ 74-76 (released March 11, 1996).

⁴¹ VDT trials with effective tariffs should be similarly grandfathered until the scheduled expiration of the trial.

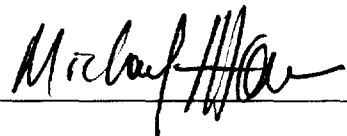
other than through radio (broadcasting or MMDS) or common carriage (under Title II) will be regulated under Title VI as a cable system or under section 653 as an OVS. There simply is no place for VDT systems in the statutory plan. Therefore, grandfathered VDT systems must convert to one of the four available regulatory models within a reasonable time after the Commission's OVS regulations go into effect. To the extent commercial VDT operators have offered service to end users, this will allow such operations to continue without disruption of service, without providing an unregulated windfall to would-be VDT operators which never initiated service under the VDT rules.

VIII. CONCLUSION.

For the reasons set forth above, the Commission should adopt safeguards against the very real potential for LEC abuse of their local telephony monopoly, and adopt specific, minimum standards for assuring nondiscriminatory access and just and reasonable and nondiscriminatory rates, terms and conditions.

Respectfully submitted,

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April 1, 1996

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 1st day of April, 1996, copies of the foregoing Comments of Time Warner Cable were delivered by hand, unless otherwise indicated, to the following parties:

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